Supreme Court, U.S.
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No. 031086 JAN 27 2004

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**IN THE SUPREME COURT OF THE UNITED STATES**

JANUARY TERM 2004

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SHR LIMITED PARTNERSHIP,
a West Virginia limited partnership,
*Petitioner*,

v

MERCURY EXPLORATION CO.,
a Texas corporation,
and
DOMINION RESERVES, INC.,
a Michigan corporation,
and
QUICKSILVER RESOURCES, INC.,
a Delaware corporation,
*Respondents*,

**On Petition For Writ of Certiorari**
**To The United States Supreme Court**

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Michigan Court of Appeals actions giving *res judicata* effect to a trial court judgment, while at the same time noting that the parties had subsequently settled the prior cases addressed in that judgment in a manner which reached a result opposite to the prior ruling violated Petitioner s rights to due process and equal protection.

2. Whether the Michigan Court of Appeals *sua sponte* raising of an affirmative defense which had been waived at the trial level and requiring Petitioner to respond to such defense without notice that it was at issue or being given a reasonable opportunity to be heard thereon violated Petitioner s rights to due process and equal protection.

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## OPINIONS BELOW

The Michigan Court of Appeals issued its unpublished opinion denying Petitioner s motion for summary disposition and granting Defendants motion for partial summary disposition on December 6, 2002. Docket No. 232466 (unpublished), Appendix A, p 1a. The Michigan Court of Appeals issued its unpublished opinion denying Petitioner s motion for rehearing on January 16, 2003. Docket No. 232466 (unpublished), Appendix B, p 11a. The Michigan Supreme Court issued its unpublished opinion denying Petitioner s application for leave to appeal the December 6, 2002 judgment of the Court of Appeals on July 28, 2003. Docket No. 123214 (unpublished), Appendix C, p 12a. The Michigan Court of Appeals issued its unpublished opinion denying Petitioner s motion for reconsideration of the Michigan Supreme Court order of July 28, 2003 on October 31, 2003. Docket No. 123214 (unpublished), Appendix D, p 14a.

## JURISDICTION

The Michigan Supreme Court issued its Opinion denying Petitioner s Application for Leave to Appeal on July 28, 2003, p 12a. On August 13, 2003, Petitioner filed its Motion for Reconsideration, which the Michigan Supreme Court denied on October 31, 2003. This Petition for Writ of Certiorari is being filed within 90 days of the denial of the Motion for Reconsideration. This Court s jurisdiction is invoked pursuant to 28 U.S.C. 1257 and 2104.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV 1

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the Unites States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

The facts of this case relevant to this Petition are quite simple. Petitioner, an owner of oil and gas rights began the case by filing its Complaint alleging that Defendants, lessees of those rights, had been making improper deductions from royalties due Petitioner on gas produced. Cross-motions for summary disposition were filed at the trial level and the Otsego County (Michigan) Circuit Court granted Defendants Motion, finding in relevant part that the leases at issue are unambiguous and the royalty clauses therein do subject the royalty owner to deduction of post-production costs necessary to render the raw product marketable and saleable as gas.

Petitioner appealed this ruling. On appeal, the Michigan Court of Appeals ruled that, although the trial court s reasoning was wrong, a correct end result had been reached. The Court of Appeals based that decision solely on the theory of *res judicata*, an affirmative defense that had never been pled or otherwise raised by Defendants in either the trial court or before the Michigan Court of Appeals.

As the basis for the *res judicata* defense it alone interjected, the Michigan Court of Appeals referred to a circuit court decision in two consolidated Crawford County, Michigan cases that had been ruled on in 1983: *North Michigan Land & Oil Corp v Shell Oil Co*, Crawford County, Michigan Circuit Court Case No. 80-004-292CA and *Melvin K Nielson, et al v Shell Oil Co,* Crawford County, Michigan Circuit Court Case No. 80-004-294 (the _1983 litigation ). The 1983 Litigation had involved predecessors in interest of both Petitioner and Defendants addressing similar issues. The Michigan Court of Appeals, in their Opinion, summarized the results of the prior litigation:

> In *North Michigan Land & Oil Corp v Shell Oil Co and Nielson v Shell Oil Co*, consolidated Crawford Circuit Court cases 80-004-292CZ and 80-004-294, decided December 8, 1983, slip op at 15, 26-27, the Court held that Defendants predecessors in interest were entitled to deduct post-production costs from royalty payments. The Plaintiffs in the consolidated cases appealed; however, before this Court issued an opinion, the parties agreed to settlements in favor of the plaintiffs. Thus, because these settlements prohibited the defendants from making the deductions, the settlements reached a result opposite from the trial court s original ruling. *SHR v Mercury*, Michigan Court of Appeals Docket Number 232466. Appendix A, p 2a.

Despite the Michigan Court of Appeals acknowledgment of the settlement agreements and its understanding that _[t]he current litigation began when defendants, in contravention of the settlement agreement, began deducting post-production costs from petitioner's royalty interests. Appendix A, p 2a; *SHR v Mercury, supra* [underscore added], that Court ruled in favor of Defendants, giving *res judicata* effect to the 1983 litigation trial court ruling despite acknowledging that the parties had settled the case and that the settlement had _reached a result opposite form the trial court s original ruling. The Court of Appeals did not quote from the stipulation incorporated by reference in its own February 12, 1985 Order in that case:

> IT IS HEREBY STIPULATED and agreed by all parties, by and through their respective counsel, that the pending appeal in this matter be dismissed, with prejudice and without costs, for the reason that the parties have reached an amicable settlement of all pending issues.

Appendix J, p 98a; Appendix E, p 17a.

Despite rather extensive filings at the trial court level and before oral argument in the Michigan Court of Appeals, Defendants never raised or asserted the affirmative defense of *res judicata*. In fact, Defendants never raised the defense at all. *Res judicata* was first raised *sua sponte* by the Michigan Court of Appeals, and then only when counsel appeared before the court for oral argument. At oral argument, the Michigan Court of Appeals asked Petitioner s counsel why *res judicata* should not bar the action. Despite the fact that no notice was given that Petitioner would be called upon to defend against the assertion of *res judicata* raised only by the Court, as Defendants had never raised the

defense nor offered proof on the elements of the defense, and despite the absence in the record of facts to support the elements necessary for the proper application of *res judicata*, the Michigan Court of Appeals found for Defendants based solely on the affirmative defense of *res judicata*.

The procedural history of the present case presents a unique situation regarding the point in time where the federal questions sought to be reviewed by this Court first arose. Petitioner contends that it was the actions of the Michigan Court of Appeals, through its Opinion and Order which violated Petitioner s rights to due process and equal protection guaranteed by the 14th Amendment. The first time the federal questions could have been raised was in a Motion for Rehearing in the Michigan Court of Appeals, where indeed, they were raised when Petitioner stated: _[t]he practical effect of this Court s decision is to deprive the plaintiff of property rights without affording it at any time the opportunity to be heard. Appendix F, p 29a. The Michigan Court of Appeals in its cursory denial of rehearing did not address on the federal questions raised. Appendix B, p 11a.

Petitioner sought appellate review by the Michigan Supreme Court, again raising the issues with due process and equal protection implications. Appendix G, pp 34a, 36a, 52a, 53a - 60a, 62a. The Michigan Supreme Court denied Petitioner s Application for Leave to Appeal stating only that that court was _not persuaded that the questions presented should be reviewed by this Court. Appendix C, p 12a. Petitioner again raised the federal questions in a Motion for Reconsideration, asking the Michigan Supreme Court to reconsider its denial. Appendix H, 77a. Petitioner therein stated that:

> _[t]he errors noted in Plaintiffs [Application for Leave to Appeal] embraced issues fundamental and important to Michigan s jurisprudence, including due process, equal protection waiver of defenses, misapplication and improper expansion of the doctrine of *res judicata*, the appearance of partiality by a tribunal, and the Court of Appeals disregard for new developments in the law among others. Appendix H, p 79a.

With no discussion of the federal questions, the Motion for Reconsideration was also denied. Appendix D.

## ARGUMENT FOR GRANTING THE WRIT

This Petition presents a foundational question regarding *res judicata* and its relationship to due process and equal protection. The most basic issue presented being that the Michigan Court of Appeals denied Petitioner access to the courts through its extreme and incorrect use and application of *res judicata*. Although *res judicata*, like other types of estoppel, is typically a matter of state law (*Postal Telegraph Cable Company v City of Newport, Kentucky*, 247 US 464, 475, 38 S Ct 566, 62 LEd 1215 (1918)), this Court has long held that extreme applications of the doctrine may be inconsistent with a federal right that is _fundamental in character. *Richards v Jefferson County, Alabama*, 517 US 793, 797, 116 S Ct 1761, 135 LEd 2d 76 (1996), citing *Postal Telegraph*, *supra* at 476.

The Michigan Court of Appeals gave binding force and effect of *res judicata* to a judgment even after affirmatively noting that such judgment had been appealed

and, while appeal was pending, the parties to the judgment settled the litigation in a manner contrary to that judgment, dismissing the appeal pursuant to that settlement. In essence, the Michigan Court of Appeals gave *res judicata* effect to a judgment that was inconsistent with a subsequent contract reached between the parties to the judgment. By doing so, the Michigan Court of Appeals reached the wholly illogical conclusion that although the earlier judgment was not even binding upon the parties to the initial judgment, due to the settlement agreement on theories of privity, it was binding upon the parties successors, who were also, by virtue of privity entitled to the benefits of the subsequent contract. Such application of *res judicata* is a direct attack on, and violation of, both due process and equal protection.

Further violation of due process and equal protection is shown in that, although the affirmative defense of *res judicata* had not been addressed, much less raised, and under Michigan law was waived by Defendants, the Michigan Court of Appeals interjected the defense, *sua sponte*, at oral argument, having given Petitioner no notice of the defense or an opportunity to respond to the defense, and thereafter basing its decision solely on the waived, unnoticed, unbriefed, unargued and unsupported affirmative defense of *res judicata*.

## ARGUMENT I

**The Michigan Court of Appeals actions giving *res judicata* effect to a trial court judgment, while at the same time noting that the parties had subsequently settled the cases addressed in that judgment in a manner which reached a result opposite to the trial court s ruling, violated Petitioner s**

**constitutional rights of due process and equal protection.**

The Michigan Court of Appeals summary disposition of Petitioner s claims based on *res judicata* in this case was a vicious abrogation of some of the fundamental rights on which our entire system of justice is based.

It has been well settled by this Court that *res judicata* is typically a matter of state law. *Postal Telegraph*, *supra*. This Court has also held, however, that extreme applications of *res judicata* may well be inconsistent with fundamental federally guaranteed rights. *Richards*, *supra*. Further, in *Hansburg v Lee*, 311 US 32, 40, 61 S Ct 115, 85 L Ed 22 (1940), this Court stated that:

> when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of *res judicata*, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes.

*Id.* [emphasis added].

Only final judgments may be given *res judicata* effect. See *Montana v United States*, 440 US 147, 153, 99 S

Ct, 970, 59 LEd 2d 210 (1979). For well over a century, this Court has also recognized that even a final judgment only retains its *res judicata* effect _so long as the judgment in the first suit remains unmodified. *Southern Pacific RR Co v United States*, 168 US 1, 49, 18 S Ct 18, 42 LEd 355 (1897). The trial court judgment in the 1983 Litigation was not the final order or judgment in the matter, the final order being the Michigan Court of Appeals Order dismissing the 1983 Litigation *pursuant to stipulation.*

Appendix E, p 16a; Appendix J, 98a. Because the trial court s order was neither affirmed nor reversed in the Michigan Court of Appeals final disposition of the case, it was implicitly vacated.

Even if the trial court s order in the 1983 litigation were determined to be a final judgment, the settlement and subsequent Michigan Court of Appeals Order referencing the settlement clearly modified the trial court s order. The Michigan Court of Appeals even recognized this modification in its Opinion on the current matter: _the settlements reached a result opposite from the trial court s original ruling. Appendix A, 2a. *SHR v Mercury, supra.* Because the settlement and the Michigan Court of Appeals Opinion incorporating it modified the trial court s judgment, the trial court s judgment should not be given *res judicata* effect. See *Southern Pacific RR, supra* at 49; *United States v Moser*, 266 US 236, 241, 45 S Ct 66, 69 LEd 262 (1924).

This Court has stated that *res judicata* is a doctrine central to the purpose for which civil courts were created, that purpose being _to secure the peace and repose of society by the settlement of matters capable of judicial determination. *Southern Pacific RR, supra* at 49. More

recently, in *Montana*, *supra* at 153, that purpose was described as being _the *conclusive resolution* of disputes within their jurisdictions. [emphasis added]. The Michigan Court of Appeals utter disregard of the settlement that had concluded the 1983 Litigation and reinstatement of the trial court s order through improper use of *res judicata* is directly contrary to that stated purpose. The Michigan Court of Appeals threw aside the settlement which had been entered into by the parties in order to conclude the litigation and reinstated the trial court judgment which had been vacated by the parties through their settlement and the Michigan Court of Appeals order incorporating that settlement.

The Michigan Court of Appeals violated Petitioners rights of due process and equal protection through its extreme application of *res judicata* which denied Petitioner an opportunity to have its valid claim heard and settled by the courts.

**Public policy and basic justice require this Court to review and reverse the Michigan Court of Appeals application of *res judicata* in this case.**

In its Opinion, the Michigan Court of Appeals recognized that the parties to the 1983 Litigation - with which the parties to the current litigation are in privity - reached a settlement while appeal was pending and that such settlement _reached a result opposite from the trial court s original ruling. Appendix A, p 2a; *SHR v Mercury, supra.* The Michigan Court of Appeals went on to make the extraordinary ruling that _[t]he fact that the previous litigation ultimately settled after the trial court s final order was issued does not preclude the order s *res judicata* effect.

*Id.* The Court of Appeals footnotes that the settlement from the prior litigation does not have *res judicata* effect because it was not entered in the form of a consent judgment. Appendix A, p 3a; *Id.* The Michigan Court of Appeals, however, ignored the Order it itself entered dismissing the appeal in the prior action, which incorporated by reference the stipulation that stated that the dismissal was issued _for the reason that the parties have reached an amicable settlement of all pending issues. Appendix E, p 17a, Appendix J, p 98a. That dismissal Order, not the trial court s judgment, was the final order/judgment in the case and it includes, through reference thereto, the parties settlement agreement. That Order dismissing the case, by its nature as the order finally disposing of the case, should trump the *res judicata* effect of the trial court judgment.

Ignoring its own order and giving more import to the initial judgment than the subsequent settlement places form over substance. This _form over substance ruling seems to indicate that settlements embodied in consent judgments have a binding effect on the parties thereto over and above that of settlement agreements not incorporated into consent judgments. The myriad issues presented by this ruling include equal protection violations involved with granting different rights to parties who use consent judgments than those who simply settle and dismiss a case.

By giving *res judicata* effect to the prior ruling, minimizing the subsequent settlement and ignoring the actual final order, the Court of Appeals has raised issues of great jurisprudential importance. As set forth earlier, this Court s stated purpose for the civil courts, which is to be furthered by the use of *res judicata*, is _the conclusive resolution of disputes . . . *Montana, supra* at 153. Using *res judicata* to abrogate a settlement voluntarily entered into by the parties,

or by their predecessors in interest, is wholly inconsistent with promoting the conclusive resolution of disputes. On the contrary, it invites repeated confrontation activities that trigger future litigation.

The Michigan Court of Appeals use of the prior decision in its application of *res judicata*, ignoring the settlement referenced in its own order dismissing the 1983 Litigation, will have a disastrous effect on settlements. The chilling effect that such a decision could have on settlements after trial, while appeals are pending, is undeniable. If the decision is allowed to stand and be incorporated into Michigan jurisprudence, then parties who have lost at trial court would be loathe to enter into settlements, even those entirely in their favor, and even if incorporated in subsequent orders of the Court of Appeals, because any dispute arising thereafter would be decided contary to the settlement based on the *res judicata* effect given to the prior, abrogated judgment. Similarly, parties who have won at trial would be unlikely to agree to consent judgments when settling cases during an appeal s pendency, not wanting to lose the potential binding effect of the prior judgment.

## ARGUMENT II

**The Michigan Court of Appeals *sua sponte* raising of an affirmative defense which had been waived by Defendants and requiring Petitioner to respond to such defense without notice that it was at issue or being given a reasonable opportunity to be heard thereon violated Petitioner s rights by denying Petitioner due process of law and equal protection under the laws.**

*Res judicata* was not raised until oral argument before the Michigan Court of Appeals (for which no transcript exists). One appellate judge asked Petitioner s counsel why a prior decision between the predecessors of the parties did not constitute a *res judicata* bar to Petitioner s claims. In response, counsel advised the Michigan Court of Appeals that not only had the predecessors settled their controversy in a manner directly contrary to the judgment during the appellate process, but also, because the defense had not been raised, it had been waived. Appendix I, p 95a. The Michigan Court of Appeals recognized the existence of the settlement, but construed it to have no effect on *res judicata* because it was not incorporated into an _agreed [consent] judgment. Appendix A, p 3a. It made no reference to waiver and it ignored its own order dated February 12, 1985 entered in the matter and maintained within its own archives (Appendix E, p 15a), which incorporated the Stipulation for Settlement (Appendix J, p 97a), which stated:

> IT IS HEREBY STIPULATED and agreed by all parties, by and through their respective counsel, that the pending appeal in this matter be dismissed, with prejudice and without costs, for the reason that the parties have reached an amicable settlement of all pending issues.

At the very least, the February 15, 1985 Order, by recognition of the settlement, superseded the trial court order and, in any case, constituted a subsequent _consent judgment that should have been recognized by the Michigan Court of Appeals.

The Michigan Court Rules unequivocally require that defenses not asserted in the initial responsive pleading (or a motion for summary disposition filed prior thereto) are waived. *Stanke v State Farm Ins*, 200 MichApp 307, 312; 503 NW2d 758 (1993); citing *Campbell v St John Hosp*, 434 Mich 608, 616; 455 NW2d 695 (1990). MCR 2.111(F) expressly codifies this case law, clearly stating that _defense not asserted in the responsive pleading or by motion as provided by these rules is waived. MCR 2.111(F)(2). The rules also, in MCR 2.111(F)(3), set forth the pleading requirements for properly raising, and hence avoiding waiver of, an affirmative defense. This is also a proposition recognized by this Court. *State of Arizona v State of California*, 530 US 392 392, 410, 120 S Ct 2304, 147 LEd 2d 374 (2000).

Defendants never, at any time, raised *res judicata*, thus waiving the defense under clear Michigan law. *Head v Benjamin Rich Realty Co,* 55 Mich App 348; 222 NW2d 237 (1974). The Michigan Court of Appeals discussion of the defense on its own initiative at oral argument and using it as the basis for its decision, ignored the clear mandates of MCR 2.111 and the strict adherence thereto by other panels of the Michigan Court of Appeals. See *Grzesick v Cepala*, 237 MichApp 554; 603 NW2d 809 (1999) (Court of Appeals affirmed trial court s ruling that pursuant to MCR 2.111(F)(3) defendant waived affirmative defense by failing to plead it in the second amended answer to petitioner's countercomplaint).

Nothing about the defense of *res judicata* as adopted in Michigan allows, let alone requires, a court to ignore the mandate of MCR 2.111(F)(3). The Michigan Supreme Court has stated that *res judicata*

> is not a constitutional mandate that must be carefully construed to maintain its integrity, but only a tool created by the courts § The goal of *res judicata* is to promote fairness, not lighten the loads of the state court by precluding suits whenever possible.

*Pierson Sand Gravel, Inc. v Keeler Brass Co*, 460 Mich 372, 282-383; 596 NW2d 153 (1999).

The *sua sponte* interjection of the defense cannot remotely be considered consistent with fairness. It was not raised below. It was not even raised prior to oral argument in the Michigan Court of Appeals. In *Pierson Sand Gravel, Inc. v Keeler Brass Co*, 460 Mich 372, 282-383; 596 NW2d 153 (1999), the Michigan Supreme Court reaffirmed the rule that the failure of a party to raise an issue waives review of that issue on appeal.

The due process issues involved in the Michigan Court of Appeals imposition of the defense which Petitioner was not afforded an opportunity to defend against are inescapable. Constitutional due process, as guaranteed by both the Michigan Constitution and the Constitution of the United States, requires notice and an opportunity to be heard; minimally: (1) notice of the time and place of hearing; (2) a hearing before a properly authorized body; (3) a reasonably definite statement of the charge or charges to be defended against; (4) the right to cross-examine adverse witnesses; (5) the right to produce witnesses on ones own behalf; and (6) a

full consideration and a fair determination according to the evidence of the controversy by the hearing body. Michigan Civil Jurisprudence, Constitutional Law, 158. *LaChance v Bricson*, 522 US 262, 118 SCt 753, 139 LEd 695 (1998); *Dation v Ford Motor Co*, 314 Mich 152, 167; 22 NW2d 252 (1946); *Hansons v State Board of Registration in Medicine*, 253 Mich 601, 607; 236 NW 225 (1931). The Michigan Court of Appeals violated the Petitioner's rights to due process by *sua sponte* raising the *res judicata* defense and deciding the case solely on that basis. That defense had been waived. Moreover, the record was devoid of evidence to establish the elements of the defense, and Petitioner had never had the opportunity, nor the need prior to oral argument before the Court of Appeals, to defend against it.

The Michigan Court of Appeals failure to follow the Michigan Court Rules denied Petitioner s due process rights by requiring Petitioner, at oral argument, to defend against a claim which Petitioner had no advance reason to believe it would be called upon to address. Recognizing the inherent differences between civil and criminal law, the Michigan Court of Appeals raising and deciding a case upon an affirmative defense not raised by a party smacks of the violation of due process condemned by this Court in *Cole v Arkansas*, 33 US 196; 92 L Ed 644 (1948). There the Court stated, _It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never brought. *Id* at 201. Equally, a civil litigant has the right to rely upon the uniform application of Court Rules and should not be required, at oral argument on appeal, to defend against a claim (or affirmative defense) which was never tried (i.e. _ no evidence was gathered upon) *and* for which he was never charged (i.e. _ the defense was never brought, and hence, waived).

The Michigan Court of Appeals error did not end with the *sua sponte* interjection of a waived defense. That error was compounded with an unjustified burden shift that accompanied such interjection. When one of the judges on the Michigan Court of Appeals panel raised the defense of *res judicata*, he did not ask Defendants counsel, Does *res judicata* apply to bar this claim against your client? Instead, he asked Petitioner's counsel why *res judicata* did not bar his claim, Appendix I, p 95a. In Michigan, it is the burden of the party asserting *res judicata* to prove that the defense applies; it *is not* the burden of the party against whom the defense is asserted to prove that it *does not* apply. *Sloan v City of Madison Heights,* 425 Mich 288; 389 NW2d 418 (1986); *E & G Finance Co Inc v Simms,* 362 Mich 592; 107 NW2d 911 (1961). The Michigan Court of Appeals shifting of the burden, in essence, required Petitioner to prove, as an additional element of its claim, that *res judicata* was inapplicable. This burden shifting constituted another violation of Petitioner s constitutional rights, this time, those of Equal Protection. The Equal Protection guarantees granted by the Constitution require that States treat like cases alike, while they may treat unlike cases accordingly. *Vacco v Quill*, 521 US 793, 138 LEd2d 834 (1997). Equal Protection, as interpreted by Michigan courts, prohibits disparate treatment of one party, or class of parties, from others similarly situated where the reason for such disparate treatment is arbitrary and capricious. *Crego v Coleman*, 463 Mich 248; 615 NW2d 218 (2000) *cert denied*, 531 US 1074, 148 LEd2d 667 (2001). The Michigan Court of Appeals, for no reason at all, required Petitioner in this cause to prove not only its claim, but also that an affirmative defense - one not even raised by Defendants - did not apply thereto an element additional to those required to be proven by other Plaintiffs.

The Court of Appeals *sua sponte* interjection of an affirmative defense nullifies the Michigan Court Rules regarding the pleading and waiver of such defenses and denies parties against whom such a defense is interjected their day in court, guaranteed to them by the Michigan and United States Constitutions. Shifting the burden from Defendants to the Petitioner violates equal protection and contradicts established case law and practice established by this Court as well as the courts of Michigan. Lastly, making a decision based on a defense which the parties were not given an opportunity to present or defend against and, therefore, of which the record does not include legal or factual support plainly violates Petitioner s due process rights.

## CONCLUSION

The Michigan Court of Appeals violated Petitioner s rights to due process of law and equal protection under the laws, both rights guaranteed by the Constitution of the United States. The Michigan Supreme Court was complicit in such violation by failing to remedy the injustice of the Michigan Court of Appeals. In doing so, the Michigan Court of Appeals gave *res judicata* effect to a judgment that was not even binding on the original parties to the judgment, when neither party in the subsequent action made any claim that such Order was applicable to, much less binding upon them.

This Court must remedy the errors of the Michigan courts which have arisen due to the current extreme application of *res judicata* within the State of Michigan. Michigan s current approach to *res judicata* violates the

most basic notions of justice by placing the goal of reducing the courts dockets above that of doing justice.

Petitioner respectfully requests that a Writ of Certiorari issue, and that this Court summarily dispose of this case pursuant to Sup. Ct. R. 16 by vacating the Michigan Supreme Court s denial of Petitioner s Application for Leave to Appeal with instructions to the Michigan Supreme Court regarding the proper scope of *res judicata* and requiring that court to remand the case to the Michigan Court of Appeals for reconsideration of Petitioner s appeal, on the merits thereof.

/s/ _____

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